Panzana Enterprise Sdn Bhd v Turnpike Synergy Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS B-02(C)(A)-516–03 OF 2022 AND B-02(IM)(C)-517–03 OF 2022
LEE SWEE SENG, AZIMAH OMAR JJCA AND WAN AHMAD FARID J
7 OCTOBER 2024

Banking — Performance bond/Bank guarantee ('BG') — Whether beneficiary's call on BG was unconscionable — Contractor could not effectively perform construction contract due to Movement Control Order during Covid-19 pandemic — Employer issued notice of default to contractor and then terminated contract and made call on the BG — Whether notice of default and termination notice were null and void under s 7 of Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Covid-19 Act') — Whether employer was precluded from calling on BG on ground of unconscionability as s 7 of Covid-19 Act had temporarily suspended contractual obligations of the parties

The respondent ('Turnpike') appointed the appellant ('Panzana') as the main contractor to carry out construction works on a highway project. Pursuant to the terms of their contract, Panzana provided Turnpike with two bank guarantees ('BGs') for a total sum of RM43.5m to secure Panzana's due performance of its obligations under the contract. In February 2021, Panzana was issued a notice of default for not carrying out the works regularly and diligently. A month later, Panzana's appointment was terminated with immediate effect. Panzana disputed the termination saying that its inability to perform was due to government-imposed restrictions on the movement of labour and materials following the outbreak of the Covid-19 virus. Despite Panzana's protests, Turnpike called upon the BGs. Panzana filed an originating summons ('OS') to, inter alia, declare the call on the BGs as unconscionable and sought an order restraining Turnpike from encashing the BGs. Relying on the provisions of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('the Covid-19 Act'), Panzana obtained an ex parte temporary injunction prohibiting Turnpike from encashing the BGs, but following an inter partes hearing, the High Court dismissed the OS and allowed Turnpike's application to set aside the ex parte injunction. The instant appeals were against both those decisions. The High Court ruled that the termination notice was valid, the demands on the BGs were not unconscionable and that Panzana was not entitled to protection under s 7 of the Covid-19 Act as it had failed to prove that its inability to perform the contract was due to measures prescribed by the Prevention and Control of Infectious Diseases Act 1988.

Held, unanimously allowing the appeals, setting aside the High Court's decisions and granting an order in terms of Panzana's OS:

(1) Both the notice of default and the notice of termination were issued to Panzana during the period covered by the Covid-19 Act. The moment the Act came into operation, all contractual obligations of the parties were temporarily suspended and Turnpike was precluded from demanding that Panzana rectify its breaches under the contract. It was therefore unconscionable for Turnpike to call on the BGs in the circumstances of the case, especially when the Covid-19 Act was in place. Both the notice of default and notice of termination were null and void under s 7 of the Covid-19 Act (see paras 43–44 & 54).

(2) Panzana did not have to prove that the delay in performance was related to the measures prescribed under the Covid-19 Act. At least at this juncture, Panzana did not have to prove anything other than that it could not discharge its contractual obligations because of the different and various measures taken by the government under the Covid-19 Act (see para 47).

(3) The Covid-19 Act had to be interpreted generously, as it was enacted to relieve the sufferings of those affected by the pandemic where movements of labour and materials were severely affected. In any event, s 7 of the Covid-19 Act was broad enough to cover Turnpike's reason for making the call on the BGs — namely, its purported termination of the construction contract due to Panzana's failure to proceed with the works regularly and diligently (see paras 48–49).

(4) Although the BGs were in reality a contract between the beneficiary (Turnpike) and the bank that issued them, it could not be disputed that the BGs were inextricably linked to the performance of the construction contract as they were procured as part of the terms of that contract (see paras 52 & 54).

[Bahasa Malaysia summary

Responden ('Turnpike') melantik perayu ('Panzana') sebagai kontraktor utama untuk menjalankan kerja-kerja pembinaan sebuah projek lebuh raya. Menurut terma kontrak mereka, Panzana memberikan Turnpike dua jaminan bank ('JB') dengan jumlah keseluruhan RM43.5 juta untuk memastikan Panzana melaksanakan obligasinya di bawah kontrak tersebut. Pada Februari 2021, Panzana telah dikeluarkan notis keingkaran kerana tidak menjalankan kerja-kerja secara teratur dan bersungguh-sungguh. Sebulan kemudian, pelantikan Panzana telah ditamatkan berkuat kuasa serta-merta. Panzana mempertikaikan penamatan itu dengan mengatakan bahawa ketidakupayaannya untuk melaksanakannya adalah disebabkan oleh sekatan yang dikenakan kerajaan terhadap pergerakan buruh dan bahan berikutan penularan virus Covid-19. Walaupun Panzana membantah, Turnpike

memanggil semula JB. Panzana memfailkan saman pemula ('SP') untuk, antara lain, mengisytiharkan panggilan ke atas JB sebagai tidak wajar dan memohon perintah menghalang Turnpike daripada menunaikan JB. Bergantung kepada peruntukan Akta Langkah-Langkah Sementara bagi Mengurangkan Kesan Penyakit Koronavirus 2019 (Covid-19) 2020 ('Akta Covid-19'), Panzana memperoleh injunksi sementara ex parte yang melarang Turnpike daripada menunaikan JB, tetapi selepas perbicaraan inter partes, Mahkamah Tinggi menolak OS dan membenarkan permohonan Turnpike untuk mengetepikan injunksi ex parte. Rayuan semasa adalah terhadap kedua-dua keputusan tersebut. Mahkamah Tinggi memutuskan bahawa notis penamatan adalah sah, tuntutan terhadap JB adalah wajar dan bahawa Panzana tidak berhak mendapat perlindungan di bawah s 7 Akta Covid-19 kerana ia gagal membuktikan ketidakupayaannya untuk melaksanakan kontrak itu adalah berikutan langkah-langkah yang ditetapkan oleh Akta Pencegahan dan Pengawalan Penyakit Berjangkit 1988.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan memberikan perintah seperti dipohon SP Panzana:

(1) Kedua-dua notis keingkaran dan notis penamatan telah dikeluarkan kepada Panzana dalam tempoh yang dilindungi oleh Akta Covid-19. Sebaik sahaja Akta itu mula berkuat kuasa, semua obligasi kontrak pihak-pihak telah digantung buat sementara waktu dan Turnpike dihalang daripada menuntut Panzana membetulkan pelanggarannya di bawah kontrak. Oleh itu, ia adalah tidak wajar bagi Turnpike untuk memanggil JB dalam keadaan kes itu, terutamanya apabila Akta Covid-19 dilaksanakan. Kedua-dua notis keingkaran dan notis penamatan adalah terbatal dan tidak sah di bawah s 7 Akta Covid-19 (lihat perenggan 43–44 & 54).

(2) Panzana tidak perlu membuktikan bahawa kelewatan dalam pelaksanaannya adalah berkaitan dengan langkah-langkah yang ditetapkan di bawah Akta Covid-19. Sekurang-kurangnya pada ketika ini, Panzana tidak perlu membuktikan apa-apa selain bahawa ia tidak dapat menunaikan kewajipan kontraknya kerana pelbagai langkah yang diambil oleh Kerajaan di bawah Akta Covid-19 (lihat perenggan 47).

(3) Akta Covid-19 perlu ditafsirkan secara meluas, kerana ia digubal untuk meringankan penderitaan mereka yang terjejas oleh pandemik di mana pergerakan buruh dan bahan terjejas teruk. Walau apa pun, s 7 Akta Covid-19 cukup luas untuk merangkumi alasan Turnpike membuat panggilan ke atas JB — iaitu, penamatan kontrak pembinaan yang dikatakan disebabkan oleh kegagalan Panzana untuk meneruskan kerja-kerja dengan teratur dan bersungguh-sungguh (lihat perenggan 48–49).

(4) Walaupun JB pada hakikatnya adalah kontrak antara benefisiari (Turnpike) dan bank yang mengeluarkannya, ia tidak dapat dipertikaikan bahawa JB mempunyai kaitan yang erat dengan pelaksanaan kontrak pembinaan kerana ia diperoleh sebagai sebahagian daripada syarat kontrak itu (lihat perenggan 52 & 54).]

Cases referred to

BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd [2012] 3 SLR 352; [2012] SGCA 28, CA (refd)

Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor [2009] MLJU 1688; [2009] 1 LNS 913, HC (refd)

KNM Process Systems Sdn Bhd v Ceca Gold Company Ltd & Ors [2023] 1 MLJ 814, CA (folld)

Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (folld)

Legislation referred to

Prevention and Control of Infectious Diseases Act 1988

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ss 7, 9, Part II, Schedule, paras 1, 2

Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) Order 2020

Appeal from: *Panzana Enterprise Sdn Bhd v Turnpike Synergy Sdn Bhd* [2022] MLJU 1000 (High Court, Shah Alam)

Terence Loh (with Tan Tiam Poh and Bernice Ho Xin Hui) (Belden) for the appellant.

Vatsala Ratnasabapathy (with Dennis Khong Heng Kai and Kaushalya Ragunathan) (Zain & Co) for the respondent.

Wan Ahmad Farid J:

THE APPEALS

[1] There are two appeals before us arising from the decision of the High Court, which, by the consent of the parties, are heard together.

[2] The appeals are as follows:

(a) Civil Appeal No B-02(C)(A)-516–03 of 2022 ('Appeal 516'). Appeal 516 relates to the appellant's appeal against the learned judge's decision, which dismissed the appellant's originating summons ('OS') dated 31 March 2021; and

(b) Civil Appeal No B-02(IM)(C)-517–03 of 2022 ('Appeal 517'). Appeal 517 relates to the appellant's appeal against the learned judge's decision to allow the respondent's notice of application dated 21 April 2021 in setting aside the ex parte injunction.

THE PARTIES AND THE CONTRACT

[3] The respondent is a subsidiary of Projek Lintasan Kota Holdings Sdn Bhd. It is responsible for overseeing the construction of the Damansara-Shah Alam Elevated Expressway, also known as 'DASH'.

[4] The appellant, Panzana Enterprise Sdn Bhd, was appointed by the appellant company as the main contractor for the project known as:

> Projek Penswastaan Lebuhraya Bertingkat Damansara-Shah Alam Package DASH-CA4 — Construction and Completion of Mainline and Other Associated Works from CH. 4983 to CH.9307.

The letter of acceptance dated 4 August 2016 ('LA') was acknowledged and accepted by the appellant.

[5] The value of the contract, according to cl 7.0 of the conditions of contract dated 27 February 2017 ('COC'), is RM670,000,000.31.

[6] The commencement date of the project is 29 August 2016 and the completion date is 28 February 2019. The completion date was later extended to 30 December 2020.

[7] In addition to the COC and LA, the project is also governed by two other documents. They are the special provisions to the COC ('SPCOC') and a supplemental agreement dated 24 September 2020.

THE BANK GUARANTEES

[8] Clause 13.1(a) of the SPCOC stipulates that the appellant, as the contractor, shall provide a performance bond issued by a licensed bank to secure the due performance of the obligations under the contract. Pursuant to the said clause, the appellant provided a bank guarantee ('BG') dated 22 August 2016 issued by Ambank (M) Bhd for the sum of RM33,500,000.02 ('Ambank guarantee 1') in favour of the respondent as the performance bond.

[9] On 4 February 2021, the appellant, at the request of the respondent, further provided another BG for the sum of RM10m, also issued by Ambank ('Ambank guarantee 2'). Ambank guarantee 2 was procured in return for the

respondent's partial release of the retention sum to the appellant.

NOTICE OF DEFAULT

[10] On 10 February 2021, the project's superintending officer ('SO') issued a notice of default. The notice of default, purportedly made under cl 51.1(a) of the COC, alleged that the appellant failed to proceed with the works regularly and diligently. It, inter alia, states as follows:

> Therefore, pursuant to Clause 51.1(a) of the Conditions of Contract, we now serve you this NOTICE OF DEFAULT which you are required to remedy the aforesaid defaults within fourteen (14) days of the receipt of this Notice FAILING WHICH the Superintending Officer shall have the right to forthwith terminate the Contract by giving you a written notice pursuant to Clause 51.1(b).

[11] The appellant disputed the notice and, by a letter dated 19 February 2021 to the respondent, registered its strong disagreement with the allegations of default. According to the appellant, the project consultant should not have rejected the appellant's application for an extension of time. The appellant insisted that the reasons for the application were valid since:

(a) there was a delay in receiving the project information; and

(b) there was also a delay in procuring the authorities' approval, including from the Malaysian Highway Authority.

[12] In short, it is the appellant's position that the purported notice of default was wrongful.

[13] The respondent did not accept the appellant's explanation.

[14] On 29 March 2021, the SO issued a notice of termination pursuant to cl 51.1(b) of the COC ('notice of termination'), terminating the appellant's employment under the contract effective immediately.

[15] The appellant, through its letter dated 30 March 2021, contested the notice of termination. It contended that the purported termination was not carried out in accordance with the terms of the contract.

[16] Subsequent to the purported termination of the contract, the respondent issued and served two letters, both dated 29 March 2021, to Ambank to demand the release of the proceeds of the Bank guarantees following the notice of termination.

AT THE HIGH COURT: THE ORIGINATING SUMMONS

[17] Aware of the demand for the release of the proceeds of the two Bank guarantees, the appellant filed the OS at the Shah Alam High Court against the respondent.

[18] In the OS, the appellants sought, inter alia, for the following reliefs in encl 1:

(a) a declaration that it would be unconscionable for the respondent to call or receive the proceeds of the bank guarantees for the total sum of RM33,500,000.02 (para 1(a));

(b) a declaration that it would be unconscionable for the respondent to receive the proceeds of the bank guarantees (para 1(b));

(c) the respondent be restrained from receiving the proceeds of the bank guarantees pending the disposal of the arbitration proceeding between the appellant and the respondent (para 1(c)); and

(d) the respondent be restrained from receiving the proceeds of the bank guarantees (para 1(d)).

[19] The OS is accompanied by an application for an ex parte injunction in encl 2, seeking to restrain the respondent from receiving the proceeds of the bank guarantees pending the disposal of the OS.

[20] The ex parte application was allowed by the learned judge on 1 April 2021.

[21] On 21 April 2021, the respondent, by way of a notice of application in encl 19, applied to set aside the ex parte injunction.

[22] On 4 March 2022, the learned judge dismissed the appellant's OS. The respondent's setting aside application in encl 19 was allowed.

[23] Aggrieved, the appellant filed these appeals — Appeal No 516 and Appeal No 517 — which are now before this court.

[24] However, on 2 June 2022, the learned judge granted an Erinford injunction, restraining the respondent from receiving the proceeds of the bank guarantees pending the disposal of these appeals. Appeal No 517 is against the decision of the High Court in encl 19 in allowing the respondent's application to set aside the injunction.

[25] The grounds of the decision of the learned judge on the OS can be summarised as follows:

(a) the termination notice is valid under cl 51.1(b) of the COC;

(b) the respondent's demands on the bank guarantees are lawful since the bank guarantees are unconditional guarantees payable by Ambank on the respondent's written demands;

(c) s 7 of the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (COVID-19) Act 2020 ('COVID-19 Act') did not apply because the appellant has failed to prove the second and third conditions of s 7;

(d) s 9 of the COVID-19 Act is optional and can only be invoked if both the appellant and the respondent agree to do so;

(e) the respondent's demands on the bank guarantees were not unconscionable; and

(f) the balance of convenience does not lie in favour of the appellant.

CAN UNCONSCIONABILITY BE RAISED AS A DISTINCT GROUND?

[26] As alluded to earlier, at the High Court, the learned judge, to whom learned counsel for the respondent deferred, was of the view that a commercially sensible construction of the bank guarantees revealed that they were unconditional bank guarantees which were payable by Ambank on written demands made by the respondent to Ambank.

[27] Before us, learned counsel for the respondent, citing the judgment of the Singapore Court of Appeal in *BS Mount Sophia Pte Ltd v Join-Aim Pte Ltd* [2012] 3 SLR 352; [2012] SGCA 28 (CA) submitted that if calls on the bank guarantees are too liberally subject to injunctive relief from the courts, the security loses its efficacy and the *raison d'etre* of the bank guarantees would be eroded or even wholly undermined.

[28] I am of the respectful view that is the correct general proposition of law, even in Malaysia.

[29] But the question before us is, are there circumstances where a beneficiary, in this appeal, the respondent, is restrained from calling on a bank guarantee or performance bond? Are there legally recognised exceptions?

[30] The answer to the questions, I believe, are in the affirmative. The test is laid down by the Federal Court in *Sumatec Engineering and Construction Sdn*

Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1. The Federal Court in *Sumatec* reiterated the proposition on the principle recognising 'unconscionability' as a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense.

[31] What, then, is unconscionable? As a guide to the added exception of unconscionability, the Federal Court affirmed and applied the test applied in *Focal Asia Sdn Bhd & Anor v Raja Noraini bt Raja Datuk Nong Chik & Anor* [2009] MLJU 1688; [2009] 1 LNS 913, which is the 'seriously arguable and realistic inference' test. In delivering the judgment in *Focal Asia*, Mohamad Ariff J (later JCA) held that a demand guarantee or performance bond, which is unconditional, has first and foremost to be treated as subject to the well-established principle of autonomy of the document, which must be kept separate from the underlying contract. The rule on payment upon a call is strict, subject only to the clear fraud exception. In short, the issuing bank has to pay if the call on the document is not fraudulent or is not based on a forged document.

[32] However, as between the immediate parties, namely the principal and the beneficiary, the learned judge held that the law allows an extended exception to the autonomy principle. His Lordship then further observed as follows in his 'Conclusion' at para 11 of the judgment:

> If there is clear evidence of fraud in the underlying contract, or unconscionability, the court can interfere. In these two situations, the integrity and autonomy of the document will not be compromised, since the paying bank will not be directly prevented from acting on the document. It is the beneficiary that is prevented from making a call on the document on these grounds. Nonetheless, the evidence allowing intervention by the court must be clear. I accept the test of 'seriously arguable that the only realistic inference is fraud' as good law in an interlocutory application such as the present.

[33] Applying the said proposition the question in this appeal is therefore, whether on the facts of this appeal, the appellant had discharged this burden.

[34] To answer the question, let us now examine the material facts of the instant appeal as found by the learned High Court judge.

THE FACTUAL CIRCUMSTANCES

[35] This court takes judicial notice that beginning 18 March 2020, the Movement Control Order ('MCO') was enforced nationwide. The MCO encompassed the restrictions on movement and assembly. Above all, the MCO mandated the closure of businesses, industry which includes educational

institutions, to curb the COVID-19 pandemic.

[36] It is not in dispute that the notice of default was dated 10 February 2021. And despite the appellant's strong disagreement with the allegations of default, the SO nevertheless proceeded to issue the notice of termination on 29 March 2021.

[37] Based on the aforesaid factual matrix, the notice of termination was issued during the period covered by the Temporary Measures for Reducing the Impact of Coronavirus Disease (Covid-19) Act 2020 ('COVID-19 Act'). Section 7 of the Act provides as follows:

> The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 [Act 342] to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.

Section 7 of the COVID-19 Act comes under Part II of the same. The operation of Part II has been extended to 31 March 2021 pursuant to the Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Extension of Operation) Order 2020 (PU(A) 386/2020):

> 2 Extension of operation of Part II of the Act
>
> The operation of Part II of the Act is extended for the period from 1 January 2021 to 31 March 2021.

[38] Paragraphs 1 and 2 of Schedule to Part II of the COVID-19 Act have listed the following categories of contracts to which s 7 applies:

1	Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract.
2	Performance bond or equivalent that is granted pursuant to a construction contract or supply contract.

[39] The learned judge, in his grounds of judgment, was of the view that the appellant failed to discharge the evidential burden of establishing the appellant's inability to perform its obligation under the contract was due to the measures prescribed by the Prevention and Control of Infectious Diseases Act 1988 ('the PCIDA') so as to be entitled to the protection under s 7 of the COVID-19 Act.

[40] In short, the learned High Court judge, in interpreting ss 7 and 9 of the COVID-19 Act, concluded that the appellant is required to prove, on the balance of probabilities, that it is affected by the measures prescribed under the PCIDA before the protection afforded by s 7 of the COVID-19 Act becomes operational.

[41] With respect, we are unable to agree with this approach. We will now give our reasons.

[42] Before us, learned counsel for the respondent submitted that the delay had already started even before the commencement of the COVID-19 Act. While that might be true, the fact remains that the effective notice of default and notice of termination were issued during the period covered by the COVID-19 Act.

[43] The moment the COVID-19 Act comes into operation, the obligations of the appellant are suspended during that period. The long and short of it is that the inability of the appellant to perform the contract within that period due to the measures prescribed under the COVID-19 Act shall not give rise to the other party or parties exercising his or their rights under the contract.

[44] The extension of the argument is that the respondent would be precluded from calling on the appellant to rectify any breaches during the said period. In this case, it was to catch up with the delay in the works, which had reached about 86% and was not progressing as required under the contract.

[45] The special measures taken under the COVID-19 Act involve various phases covering restrictions such as being unable to leave home or travel to work and self-isolation the moment one is in close contact with a COVID-19 patient, though not tested positive for the virus and the like. The supply chain was disrupted and indeed, there was a general total inactivity or slowdown in the progress of construction works generally. As alluded to earlier, the affected period started on 18 March 2020.

[46] In tabling the COVID-19 Bill, Parliament was acutely conscious of the hardship suffered by all, especially those in the construction industry. As stated earlier, para 1 of the Schedule to Part II of the COVID-19 Act provides relief and suspension of contractual obligations under it.

[47] Learned counsel for the respondent submitted that the appellant must prove how the delay is related to the measures prescribed under the COVID-19 Act. With respect, we disagree. We do not think, at least at this juncture, that the appellant needs to prove anything other than that they could not discharge their contractual obligation under the contract because of the different and

various measures taken by the government under the COVID-19 Act.

[48] In our considered view, the COVID-19 Act should be interpreted generously — bearing in mind the special purpose for which the Act was enacted to relieve the suffering of those affected by the COVID-19 pandemic, where movements of labour and materials were severely affected.

[49] In any event, s 7 of the COVID-19 Act is broad enough to cover the reason behind the call, which is the purported termination of the PWD 203 contract due to the breach in that the appellant had failed to proceed with the works regularly and diligently.

[50] In *KNM Process Systems Sdn Bhd v Ceca Gold Company Ltd & Ors* [2023] 1 MLJ 814 (CA), the first respondent awarded the appellant an engineering, procurement and construction contract ('EPC contract'). Pursuant to the EPC contract, the appellant was to provide a bank guarantee to the first respondent. Subsequently, disputes arose between the appellant and first respondent regarding the performance of the EPC contract. As a consequence, by a letter dated 17 May 2021, the first respondent gave the notice to terminate the EPC contract. Prior to that, by way of a letter dated 10 May 2021, the first respondent wrote to the second respondent bank demanding the sum under the bank guarantee. Upon being notified of the demand, the appellant filed an OS for, inter alia, an injunction to restrain the first respondent from receiving the proceeds from the bank guarantee. The High Court dismissed the appellant's OS.

[51] The Court of Appeal, in allowing the appeal, held that it is of no consequence that the bank guarantee is payable on demand. Abu Bakar Jais JCA (as His Lordship then was), in delivering the judgment of the court, made the following observation at para [40]:

> As s 7 of Act 829 is applicable to the appellant, it is of no consequence that the Bank guarantee is payable on demand. This statutory provision caters to the need to deal with the spread of Covid-19 affecting Malaysian business, commerce and trade. It also grants protection to parties who ought not to be liable because of the pandemic, as provided also by the legislations of other countries in protecting their own companies. It is enacted to deal with the non-performance of contracts, including the EPC contract in times of extreme difficulties. The appellant as a Malaysian company should not be prevented to seek refuge under the terms of s 7 of Act 829. This will include the protection against the call of the on-demand Bank guarantee.

[52] We take cognisance of the respondent's contention that matters such as performance bonds and bank guarantees are, in reality, a contract between the respondent as the beneficiary and the bank that issued the bank guarantees. However, in our view, it cannot be disputed that the bank guarantees are

inextricably linked to the performance of the PWD 203 contract. The bank guarantees were procured as part of the terms of the PWD 203 contract.

[53] In the circumstances of the case, and applying *Sumatec Engineering* and *KNM Process Systems*, which we are bound to follow, such a call would be unconscionable as the COVID-19 Act was fully applicable to the parties to the construction contracts and there was in place, effected by the COVID-19 Act, a temporary suspension of all contractual obligations of the parties.

OUR DECISION

[54] For the aforesaid reasons, our decision is as follows:

(a) the test applicable to restrain the respondent from calling on the bank guarantees is whether the call would be unconscionable in the circumstances of the case;

(b) 'unconscionability' is a separate and distinct ground to restrain a beneficiary from making a call on a performance bond accorded with good commercial sense;

(c) the notice of default dated 10 February 2021 and the notice of termination on 29 March 2021 were issued during the period covered by the COVID-19 Act;

(d) the obligations of the appellant under the PWD 203 contract are suspended during that period and the inability to perform the contract during that period due to the measures prescribed under s 7 of the COVID-19 Act shall not give rise to the other party or parties exercising his or their rights under the contract;

(e) in short, the notice of default and notice of termination were null and void under s 7 of the COVID-19 Act;

(f) the attendant consequence is that the respondent is precluded from exercising its right to call for the Bank guarantees since doing so would be unconscionable in the circumstances of the case especially when the COVID-19 Act was in place; and

(g) the general proposition is that matters such as bank guarantees are, in reality, a contract between the respondent here as beneficiary and the bank issuing the bank guarantees. However, the bank guarantees are inextricably linked to the performance of the PWD 203 contract, under which the bank guarantees were procured as part of the terms of the PWD 203 contract.

[55] We find merits in the appeals. We find that the High Court had erred in not taking relevant factors into consideration and, in particular, the proper

A interpretation and application of the COVID-19 Act.

[56] We therefore allow the appeals and set aside the High Court's order.

B **[57]** We grant an order in terms of encl 1 in para 1(a), (b) and (c) and with that, the appellant's appeal against encl 19 is allowed and the order of the High Court is set aside in both appeals.

C **[58]** We allow costs to the appellant of RM50,000 for Appeal 516 here and below and we allow costs in Appeal 517 of RM10,000 here and below, both subject to allocator.

Appeals allowed, High Court's order set aside.

D Reported by Ashok Kumar

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